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No. 98-245

In The

Supreme Court of the United States

October Term, 1997

HOWMEDICA, INC., A Division of Pfizer Hospital Products Group, Inc.,

Petitioner,

vs.

GEORGE E. ELBERT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether or not there are compelling reasons to reverse the Ninth Circuit on a procedural issue which has not been directly decided by any other Circuit Court of Appeals, and is consistent with all Circuits on an analogous issue.

PARTIES TO THE PROCEEDING

Petitioner, Howmedica, Inc., describes itself as a wholly-owned subsidiary of Pfizer Inc.

Respondent George E. Elbert is an individual Plaintiff below.

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I.
INTRODUCTION

Petitioner Howmedica, Inc., Petition for Writ of Certiorari to this court incorrectly describes the issue involved as a "direct conflict" among other Circuits, by misconstruing the procedural history of this case, in order to obtain Certiorari by this Supreme Court.

The decision of the Ninth Circuit Court involves a specific procedural posture not directly addressed by any other Circuit Court of Appeals, as far as is known to counsel.

Neither does the case involve an issue under *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), hence poses no "threat" to the decision of this court.

II.
STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEEDINGS.

Plaintiff George Elbert filed this product liability case concerning a defective artificial knee prosthesis, manufactured by Defendant Howmedica, Inc., and marketed as the PCA (Porous-Coated Anatomic) Total Knee System.

A jury trial was held beginning August 3, 1993, in the District Court of Hawaii, with the jury rendering a verdict in favor of Plaintiff George Elbert in the amount of $196,775.00 on Plaintiff's claims for negligence and breach of implied warranty. Plaintiff Elbert was also found contributorily negligent, by 15%.

Howmedica appealed the verdict to the Ninth Circuit Court of Appeals, and on June 28, 1995, the Ninth Circuit Court of Appeals rendered its decision, affirming in part and reversing in part. *Elbert v. Howmedica,* Memorandum Opinion 94-15683 (9th Cir. 6/28/95).

The Ninth Circuit reversed the admission of expert testimony by Kenneth Kayser, an engineer pursuant to Rule 702 Federal Rules of Evidence.

The Memorandum Opinion remanded the case for "proceedings consistent" with the Decision.

On October 30, 1995, Elbert filed a Motion for a New Trial pursuant to Rule 59(a)(e), and 60(b) F.R.C.P. On October 31, 1995, Howmedica filed a counter Motion for Disposition of Case Following Remand, citing only F.R.C.P. 7, but no substantive rule.

B. STATEMENT OF THE FACTS

Plaintiff Elbert's case proceeded on several theories of both strict liability, express and implied breach of warranty, and negligence, based on negligent design and manufacture based upon the following:

a. Excess stress (design)

b. Thickness of plastic insert portion of the prosthesis (design).

c. Heat pressing (manufacturing process); Plaintiff alleged that Howmedica failed to properly test, or apply proper testing procedures.

In addition to the testimony of engineer Kenneth Kayser, the testimony of a well-known and a high-

respected treating orthopedic surgeon, Alan Richardson, M.D., was presented on the issue of causation. Additionally, admissions of Howmedica witnesses relating to reports of unusual and unacceptable degradation of polyethylene components received by Howmedica President, James Barbarito was presented. Inculpatory admissions were testified to by the Director of Polymer Technology, Mr. Casper Stark with regard to concerns about problems related to the degradation of the polytheylene component.

An independent research scientist, Roy Bloebaum, Ph.D., employed by the Division of Orthopedic Surgery for the Veteran's Medical Center in Salt Lake City, was also presented, establishing his observation that 52% of the PCA's had delaminated, leading to cracking and deterioration. Dr. Bloebaum's testimony established manufacturing tests his research group conducted, which were never performed by Howmedica as testified by its witnesses.

The testimony of Defense experts conceded that the design of the PCA contributed to the failure of the plastic in this case.

Additionally studies by independent groups, as well as Howmedica, Inc., in house-studies confirmed exceedingly high failure rates for the PCA.

The Ninth Circuit Court, clearly recognizing that the issue of scientific validity raised in *Daubert v. Merrell Dow, supra*, was not involved, ruled on the bases of Federal Rule of Evidence 702, that witness Kenneth Kayser was unqualified, holding specifically that the testimony was

"prejudicial" (p. 5, Howmedica's Petition for Writ of Certiorari).

C. PROCEEDINGS ON REMAND

Howmedica's motion below, cited no rule of procedure, other than Rule 7 Federal Rules of Civil Procedure, hence, the Magistrate Judge treated the motion as a "noval" motion, and utilized the standards under Rule 50(b).

No issue was raised by either side with respect to naming of additional witnesses, additional discovery, or related motions with respect to a new trial, and such motions were not at issue at the court below, pending the disposition of the initial motions to the court.

Additionally, documents were produced during trial, for which Plaintiff Elbert filed a Motion for Sanctions, which was denied; however the late-produced documents could have provided the bases for additional motions with respect to additional discovery if a new trial had been granted.

It was the Plaintiff's contention at oral arguments that Howmedica's motion and the court's disposition below was procedurally defective, for the reason that a 50(b) motion could only be had after a trial, and consideration based upon an abridged version of the previous trial prior to appellate remand was improper.

The Petition of Howmedica has misconstrued the Ninth Circuit Opinion, which clearly states the issue as "whether a trial court, in deciding a Rule 50(b) motion

following a remand from an Appellate decision requiring exclusion of evidence, may exclude from its decision the evidence erroneously admitted at trial." The court specifically remarked that it was considering this issue in an "analogous context," citing *Schudel v. General Electric Company,* 120 F.3d 991, 995 (9th Cir. 1997), *cert. denied,* 118 S. Ct. ___ (1998) (App. 2. Petition for Writ of Certiorari).

III.

ARGUMENT

A. NO COMPELLING REASON HAS BEEN PRESENTED REQUIRING REVIEW BY THE UNITED STATES SUPREME COURT

Rule 10 of the Rules of the United States Supreme Court expressly states:

> Review on a writ of certiorari is not a matter or right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. . . . the reasons the court considers:
>
> a. A United States Court of Appeals has entered a decision in conflict with a decision of another United States Court of Appeals on the same important matter; . . .

The prior Supreme Court Rule 10 required that Certiorari be granted "only when there were special and important reasons" Supreme Court Rule 10.1. Hence, under the prior Supreme Court Rule problems that are merely academic, or episodic do not constitute a special and important reason. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955). Hence, this court has granted Certiorari only in

cases involving principles which are important to the public as distinguished from the parties involved. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951); *Rice v. Sioux City Memorial Park Cemetery, supra.*

B. THE COURTS OF APPEALS ARE NOT IN CONFLICT, SO AS TO REQUIRE THE INTERVENTION OF THE SUPREME COURT

1. The Ninth Circuit properly decided a novel issue that a Rule 50(b) motion decided after an appellate remand, by analogy to similar cases under Rule 50(b) Federal Rule of Civil Procedure.

The Ninth Circuit Court in rendering its opinion below, explicitly stated that its decision was based upon the analogous situation, in which Rule 50(b) motion was made *following a trial,* the court should not exclude from consideration previously admitted evidence, which it subsequently decides was erroneously admitted. The case of *Schudel v. General Electric Co.*, 120 F.3d 991, 995 (9th Cir. 1997), involved that District Court's exclusion of evidence during a consideration of a Rule 50(b) motion, *following a trial.* The court had reconsidered its prior ruling admitting expert testimony.

In the present case, the court had previously ruled, admitting the testimony of Kenneth Kayser, on the basis of Rule 702 Federal Rules of Evidence, was reversed by the Ninth Circuit Court of Appeal, which expressly ruled that the admission of Kayser's testimony was prejudicial.

The procedural posture of the present case thus differs significantly from the cases cited pro and con on the issue by Petitioner, Howmedica, Inc. The logic of the Ninth Circuit Court in *Schudel, supra*, applies with greater force to a situation whereby an appellate court has remanded a case following an appeal. The successful Plaintiff below finds his case in an entirely different evidentiary *and procedural* posture, since he is bound by evidentiary rulings, and, possibly, by the previous jury verdict, limited to certain theories. (No rulings have been made on this in the present case).

Procedurally, there is no trial record upon remand to rely upon or to evaluate for purposes of 50(b) motion. In this connection, the dissent of Circuit Judge Reinhardt is pertinent, that it is a "full trial record on which a 50(b) motion must be based" (Howmedica's Appendix, 5).

Hence, in the procedural posture of this case, because there was no trial record from which to judge the motion, the Magistrate's ruling was clearly erroneous, as well as contradictory, since the Magistrate below had previously ruled at the first trial, that there was sufficient evidence (including Kenneth Kayser's testimony, to submit to a jury). Finally, the plain terms of 50(b) requires that such motions for verdict must be made "no later than 10 days after entry of judgment". Since obviously there was no judgment, such a motion, cannot even be procedurally considered.

When looked at objectively, Howmedica sought to avoid the evidentiary standards of a Rule 56 Motion for Summary Judgment, as well as a Motion for Judgment as a Matter of Law under Rule 50, by not citing any rule of

Federal Procedure to apply. Thus, the Ninth Circuit correctly compared the posture of the case to one in which a Motion for Judgment as a matter of law was made *after trial*, and those cases interpreting the analogous situation.

Additionally, this case differs from other cases cited by Howmedica attempting to ignore other evidence of causation, in this case, and standard of care presented below at the first, and only trial of this matter. Unlike other cases cited by the Courts of Appeals, Plaintiff Elbert cited other experts, and documentary evidence relating to the standard of care and causation. Additionally, the issue of further discovery was never addressed, since presumably, once there was a remand, and had Magistrate initially denied Howmedica's motion, such discovery motions, including the naming of new experts, could have been considered properly. However, Elbert's case never proceeded to a point where such matters could have been adjudicated.

2. The Circuit Court of Appeals are in agreement that the alternative remedy for the introduction of prejudicial evidence is a new trial.

Howmedica cites the Third Circuit of Appeal cases of *Aloe Coal Co. v. Clarke Equipment Co.*, 816 F.2d 110 (3d Cir.), *cert. denied*, 484 U.S. 853, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), and *Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), in support of its proposition that there is a conflict among the Circuits related to this issue. However, the *Aloe Coal Co.* decision is conceded by Howmedica to be dictum only. The *Lightening Lube, Inc.* case, *supra*, did consider the issue, however, as pointed out above, not in the same procedural posture as the present

case, involving a renewed motion for judgment after a full trial, and not after a remand following an appellate decision.

The Third Circuit relied on the case of *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993). The court in *Lightening Lube, Inc.*, considered that the Supreme Court of the Untied States in dicta, stated that the District Court erred in admitting or excluding evidence which should not be considered in a Motion for Judgment, citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 61 S. Ct. 189, 194, 84 L. Ed. 147 (1940).

The Third Circuit Court expressly recognized those instances whereby it would be clearly inappropriate for District Court to rely on evidentiary error in construing a Motion for Judgment:

> There is a difference in determining whether evidence should be excluded on a Motion for Judgment as a matter of law and deciding whether a record contains sufficient evidence to sustain a verdict. For example, a litigant moving for judgment as a matter of law may argue as a reason for granting its motion that certain of evidence was admitted erroneously because it was prejudicial. It is possible that even excluding such evidence, the jury had a sufficient reason to find against the movant, but the admission of the additional evidence so inflamed it as to affect its deliberation. This might be the case, for example, with bad character evidence introduced pursuant to Federal Rules of Evidence 608. *In such a case it clearly would be inappropriate for the District Court to rely on this evidentiary error in granting the Motion for*

> *Judgment because the issue of harmful error is distinct from the issue of the sufficiency of the evidence,* . . . 4 F.3d at 1199, fn. 26.

All that *Lightening Lube, Inc., supra,* stands for, is that in the Third Circuit, there are limited instances in which the federal court may determine a Motion for Judgment following a trial by considering inadmissible evidence. Hence, the Third Circuit cases, are in fact, consistent with the rulings of other Circuits on this issue, but qualifying the rule of other Circuits. Additionally, the *Lightening Lube, Inc., supra,* recognized that a flat, across-the-board rule could lead to "an unjust result where a litigant actually tendered additional evidence, which the District Court excluded on the ground that it was cumulative".

Howmedica concedes in this case that there were procedural rulings, limiting expert witnesses on the issue of liability and/or causation, which could have been presented by Respondent. Although the District Magistrate's ruling was not based on cumulativeness, the situation is precisely the type of situation whereby the Third Circuit could find that "fairness would dictate that the District Court consider entire trial record in ruling on a motion for judgment", *Lightening Lube, Inc. v. Witco Corp., supra,* 4 F.3d 1200.

C. ALL OTHER CIRCUITS ARE IN AGREEMENT WITH THE RULING OF THE NINTH CIRCUIT ON THE ANALOGOUS SITUATION

Howmedica acknowledges that the Eleventh Circuit, in the case of *Jackson v. Pleasant Grove Health Care Ctr.,* 980 F.2d 692 (11th Cir. 1983), and the Sixth Circuit *Douglas v.*

Eaten Corp., 956 F.2d 1339 (6th Cir. 1992), have supported the Ninth Circuit approach. Likewise, the Fifth Circuit in the case of *Sumitomo Bank v. Product Promotion, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983), and the Eighth Circuit in the case of *Mid Continent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973), are in harmony with the ruling of *Schudel v. General Electric Co., supra.*

Hence, Howmedica has framed the issue in such a way as to misstate the ruling of the Ninth Circuit, and to mis-characterize the ruling as in conflict with that of the Third Circuit, which is not the case.

IV.

CONCLUSION

The Supreme Court of the United States has adopted the limiting rule of requiring a "compelling reason" to accept Certiorari.

The ruling of the ninth Circuit court is on a distinct procedural issue which has not been reviewed previously by other Circuits.

The analogous situation presented of a Rule 50(b) motion following a full trial, and requiring a court to review the full trial record, including previously admitted evidence, is in harmony with all of the Circuit Courts of

Appeals that have ruled on the issue, and the Supreme Court need not exercise Certiorari.

Respectfully submitted,

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